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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ARMANDO SOTELO PASCACIO,

Defendant and Appellant.

D074570

(Super. Ct. No. FWV1502029)

APPEAL from a judgment of the Superior Court of San Bernardino,  
Shahla S. Sabet, Judge. Affirmed.

Elisa A. Brandes, by appointment of the Court of Appeal, for Defendant and  
Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General,  
Melissa Mandel, Meredith White and Stephanie H. Chow, Deputy Attorneys General, for  
Plaintiff and Respondent.

Defendant Armando Sotelo Pascacio appeals from a judgment of conviction after a jury found him guilty of engaging in sexual intercourse with a child 10 years old or younger and oral copulation of a child 10 or younger. The court sentenced him to 40 years to life.

Pascacio raises several issues on appeal but primarily argues there was insufficient evidence of the specific sexual activity required under Penal Code section 288.7, subdivision (a) for a reasonable juror to find him guilty of engaging in sexual intercourse with a child 10 years old or younger.<sup>1</sup> He contends that while the evidence (including his own statement) may demonstrate that he penetrated Jane Doe's genitalia with his tongue, there is insufficient evidence in the record to support an inference of penile penetration.

Having reviewed the record and the applicable law, we find that substantial evidence, including defendant's statement and the testimony of other witnesses, supports the jury's conclusion that Pascacio engaged in sexual intercourse with the victim. In light of the great weight of that evidence, his claims of ineffective assistance of counsel, instructional error and cumulative error also fail for lack of prejudice, among other reasons discussed below. Accordingly, we affirm.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Pretrial Procedural Overview*

The San Bernardino County District Attorney brought four charges against Pascacio: sexual intercourse with a child 10 or younger, under Penal Code section 288.7, subdivision (a) (count 1); oral copulation of a child 10 or younger, under the same section, subdivision (b) (count 2); and lewd acts upon a child, under section 288, subdivision (a) (counts 3–4). After a series of three *Marsden* hearings and suspension of the criminal proceedings for a psychiatric report, proceedings were reinstated, a fourth *Marsden* motion was denied, and the case advanced to trial. (See *People v. Marsden* (1970) 2 Cal.3d 118.)

### B. *Trial*

At trial, the prosecution called four witnesses: the alleged victim, Jane; Josefina M., Jane's mother; Mirella (Mel) Del Degan, a forensic nurse clinician; and City of Ontario Officer Luis Munive. Primarily, the prosecution relied on a lengthy statement Pascacio voluntarily provided to Officer Munive shortly after Jane was admitted to the hospital. In that statement, Pascacio admitted to molesting Jane on three separate occasions in the preceding month, May 2015. He insisted, however, that she was the aggressor who was "possessed by desire" and "mounted" him multiple times to coerce him into sexual activity.

According to Pascacio, on one occasion, he was asleep when Jane came into his bedroom, took off his pants, and took off all her clothes. They kissed. She masturbated his penis for about three minutes and then climbed on top of him. He claimed that she

"was provoking" him even though it "felt very wrong" and he wanted to keep sleeping. She protested and offered to "never say anything." He relented, "caressed" her vagina and genitalia, and she became more aroused.

Two or three days later they had a similar encounter. Pascacio was again on the bed in his bedroom, but this time instead of forcing his pants off, Jane opened his zipper and masturbated his penis for about a minute. She mounted him and was "grinding" onto him. They kissed with the tongue. He caressed her genitalia. He put his finger "inside" but only "on the edge." He may have "caressed" her anus. While she was mounted on top of him, she wanted to put his penis into her vagina, but he stopped her. He did not follow through because he could not produce an erection. He did not put it inside her vagina, but he put it "above" and "on the side." Later, with her lying next to him, she masturbated both of them. She grabbed his head and put it between her legs, and he "kissed" her genitalia for about a minute. After discussing this episode, Munive asked again whether he "put [his] penis in." "[N]o. Not inside." After denying it again, he cautioned, "All I'm saying—that is—if it—if anything else comes out, I hope they pro[ve] . . . it . . . to me. Mm-Hmm. Prove it well."

Pascacio also discussed a third instance in which Jane allegedly grabbed him and pulled him into the bathroom. She quickly took off her underwear and forcefully directed him to bend down to kiss her genitalia. This encounter was brief because he was worried that someone would come into the bathroom.

During trial, Pascacio denied that any of these three events occurred. He testified that he fabricated the statement because he feared that Munive would assault him, because he could not understand Munive's Spanish, and because he was sleep-deprived.

Josefina M., Jane's mother, testified about the chain of events leading to Pascacio's arrest. Jane was born in October 2008; she was six years old during the relevant period (and eight when she testified). Pascacio is Jane's father's first cousin, but Jane refers to him as her uncle.

Pascacio and his family (wife and three children) lived with Jane and her family (mother, father, older sister and older brother) in a two-bedroom apartment, one family in each bedroom. Jane's mother worked nights, from 4:00 p.m. to 12:30 a.m. She paid Pascacio's wife, Teresa, to take care of her children during the day. Teresa also watched her own children and did not otherwise work outside the home. Jane's father worked weekdays from 7:00 a.m. to 7:00 p.m. Pascacio had two jobs, and on weekdays he would typically arrive home about 3:00 p.m., shortly before Josefina M. left for her night shift.

On Friday, May 29, 2015, Jane complained to her father about pain near her vagina. He called her mother at work to ask her to check out the issue. By the time Josefina M. arrived home, about 1:00 a.m., Jane was sleeping, so Josefina M. waited to check on her until the following morning. On Saturday, Jane told Josefina M. that she had pain while urinating. Josefina M. inspected her vagina and found two "bumps," which she had never seen before. Believing they were caused by heat rash, she applied ointment. On Sunday, Jane and her immediate family (without Pascacio or his family) spent much of the day at the mall. After they returned to the apartment about 8:00 p.m.,

Josefina M. was in the kitchen cooking when Jane asked if she would go with her to the bathroom. Jane said she could not urinate because of the pain and cried. Josefina M. returned to the kitchen, but Jane insisted she show her something in the bedroom. At that point Jane showed her mother that her underwear was bloody and, after inspecting her again, Josefina M. found that she had more bumps and was bleeding from her vagina. Thinking that her daughter may have been assaulted, she and her husband asked Jane who had hurt her, naming all the other male individuals in the house before asking about Pascacio. Josefina M. asked about him last because he was "[t]he person I least suspected." But Jane identified Pascacio as the individual who hurt her.

At that point, Jane told Josefina M. about one instance in which Pascacio molested her. He had been asleep in his bed on the top bunk in his family's bedroom while Jane watched her brother and cousin play video games in the same bedroom. Jane left a couple times (to see her father who had come home and to get something to eat), and after returning from the kitchen, sat on the bottom bunk. He then came down next to her from the top bunk, covered her with a sheet, covered her mouth with his hand, removed her underwear, and inserted his tongue in her vagina. When she told her mother about this, she was "shaking and crying, and she was scared."

When their conversation at the apartment ended, about 11:00 p.m, they went immediately to the hospital. Josefina M. discussed what had happened with the hospital staff, and they called the police. Around 4:30 a.m., Jane underwent a Sexual Assault Response Team (SART) exam and tested positive for herpes simplex type one on her

genitalia.<sup>2</sup> Mel Del Degan, the forensic nurse clinician who examined Jane, testified that she saw several vesicles that were intact, several that had already been ruptured, several areas of ulceration on the genital area, and a few vesicles and ulcerations around the anal area. She testified that "[o]ne of the most common ways" for transmission of oral herpes to genitalia would be by an individual with a cold sore placing their mouth on another person's genitalia; another way would be an individual with a cold sore touching their own mouth and then their genitalia. Del Degan also testified that apart from redness, the hymen was normal. Nonetheless, the results of her exam were "consistent with a male adult's penis rubbing Jane Doe's vagina." According to her testimony, "inter-labia coitus" would be consistent with the results, where "the penis is actually inserted between the labias and rubs up and down versus through the hymen . . . . It still penetrates all the way through the labia majora, through the labia minora."

Jane testified that Pascacio touched her genitalia with his tongue but not with any other part of his body and that afterwards, he told her in a low voice, "don't say anything to your mom or dad." On cross-examination, Jane testified it was possible that she had dreamt this, that it was a bad dream, and that it did not actually happen.

Luis Munive, the police officer who responded to the call, testified about the investigation, including conversations he had had with Jane, her mother, and Dr. Khan at the hospital. As previously noted, Munive also testified about Pascacio's statement.

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<sup>2</sup> The herpes-simplex virus type one is known as oral herpes because it is commonly, though not exclusively, contracted in or around the lips and mouth area. Herpes-simplex type two is known as genital herpes and is commonly, though again not exclusively, contracted in or around the genitalia.

After the prosecution rested, Pascacio testified on his own behalf and called no other witnesses. He denied having any sexual contact with Jane and claimed his statement to the police was entirely false. According to Pascacio, he described molesting Jane for fear that if he had not done so, Officer Munive would have assaulted him because that is how police handle interrogations where he lived in Mexico. He also testified that he could not understand the officer because Spanish is not his primary language, and that he was exhausted during the interview because his two jobs left him sleep-deprived.

In rebuttal, Jane's sister W. testified that Pascacio and his family spoke Spanish at home. She also testified that she observed Pascacio and Jane come out of the bathroom together and spend time together in his bedroom. On one occasion, W. saw Jane and Pascacio on the couch together with his arms wrapped around her, but when Jane saw that W. was present she rushed away and buttoned up her blouse. Although W. asked, Jane would not talk about what was happening between her and Pascacio. W. also testified that Pascacio made her feel uncomfortable because he would leer at her as if he were pursuing her. He once came up close behind her in the kitchen and slowly touched her shoulder in a way that made her feel uncomfortable. W. raised these concerns to her mother, but she minimized the issue and told them not to go into Pascacio's bedroom. In a brief surrebuttal, Pascacio denied leering at W. or putting his hand on her shoulder in a way that would make her feel uncomfortable.



At the conclusion of the evidence, Pascacio moved to dismiss count one pursuant to section 1118.1. The court denied the motion, but it dismissed counts three and four pursuant to section 1118.1 on its own motion.

The jury found Pascacio guilty of both sexual intercourse and oral copulation with a child 10 or younger. The court sentenced him to a term of 40 years to life: 25 years to life on count one and a consecutive term of 15 years to life on count two.

## DISCUSSION

### A. *Legal Standards*

To sustain a conviction for engaging in sexual intercourse with a child 10 years old or younger under section 288.7, subdivision (a), the prosecution must prove beyond a reasonable doubt that the adult defendant engaged in sexual intercourse or sodomy with a child 10 or younger. "Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis." (*People v. Mendoza* (2015) 240 Cal.App.4th 72, 79 (*Mendoza*), citing *People v. Dunn* (2012) 205 Cal.App.4th 1086, 1097 (*Dunn*); *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 (*Karsai*).)

On appeal, we must determine whether "a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt . . . ." (*People v. Johnson* (1980) 26 Cal.3d 557, 576–577 (*Johnson*); accord *People v. Reilly* (1970) 3 Cal.3d 421, 425; see also U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7, 15; *Jackson v. Virginia* (1979) 443 U.S. 307, 318.) The court views the record in the light most favorable to the respondent, presuming in support of the judgment every fact which the trier of fact could reasonably deduce from the record.

(*Johnson*, at p. 576.) If the evidence is not "reasonable, credible and of solid value, such that a rational trier of fact could find the defendant guilty beyond a reasonable doubt," the conviction or finding must be reversed. (*Id.* at p. 578.)

B. *Substantial Evidence Supports the Judgment.*

Pascacio argues there is insufficient evidence of penile penetration to support a finding that he engaged in sexual intercourse. In support, he claims that Jane testified he never touched her with his penis, Del Degan testified that she could not determine whether penile penetration had occurred, and he never actually admitted to penile penetration.

In his statement, however, Pascacio described a series of acts from which it can be reasonably inferred that his penis penetrated her genitalia.<sup>3</sup> If, as Pascacio asserted, Jane was naked, mounted on him and "grinding" her genitalia onto his exposed penis, it follows that his penis penetrated her labia majora, the outermost part of her genitalia. Although the evidence did not prove that Pascacio's penis penetrated Jane's vagina, the jury does not need to make that specific determination in finding sexual intercourse. Instead, it need only conclude there was "any penetration, no matter how slight, of the vagina *or genitalia* by the penis." (*Mendoza, supra*, 240 Cal.App.4th at p. 79, italics added.) Interlabial penetration is sufficient. (*Karsai, supra*, 131 Cal.App.3d at p. 232 [rape charge] ["[p]enetration of the external genital organs is sufficient to constitute

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<sup>3</sup> Although at certain points the statement suggests that defendant may have admitted to penile penetration of the vagina, he never clearly said so, and he repeatedly denied it, claiming instead that he rejected Jane's appeals for further sexual activity because she was "not tempting as . . . a woman."

sexual penetration"]; *Dunn, supra*, 205 Cal.App.4th at p. 1097 [relying on *Karsai*, sexual intercourse with a child 10 or younger required proof of "penetration of [the victim's] labia majora, not her vagina"].)

Apart from Pascacio's statement, additional evidence further supports the verdict. Testimony from Del Degan, the SART nurse who examined Jane, showed that her injuries, while not conclusive, were consistent with the conduct described in Pascacio's statement. W.'s testimony confirmed that Pascacio and Jane had been alone together in the bathroom without explanation.

Pascacio correctly notes that Jane testified he never touched her with his penis. But Jane's is not the final word. A reasonable trier of fact would understand that the testimony of a child—here an eight-year-old discussing events two years earlier—is subject to a different kind of analysis than that of an adult and requires consideration of all the factors surrounding the testimony, including the child's cognitive development and ability to perceive, understand, remember, and communicate. Regardless, as discussed, there was ample evidence outside of Jane's testimony to find that Pascacio engaged in sexual intercourse, including his own statement.

Accordingly, we conclude a reasonable trier of fact could have found Pascacio guilty beyond a reasonable doubt of engaging in sexual intercourse with Jane Doe.

C. *The Trial Court Had No Duty to Give a Limiting Instruction, and Pascacio's Trial Counsel Was Not Deficient for Failing to Request Such an Instruction or Object to the Prosecutor's Use of Facts Not in Evidence During Closing Argument.*

Officer Munive testified that Dr. Khan "hadn't told [him] specifically that [Jane's hymen] was broken, but there would be a likelihood of penetration." On redirect, Munive recalled that Khan told him that the hymen "appeared to have been broken" and that this meant there had been "penetration in the vaginal cavity." In closing, the prosecution argued that Khan's medical opinion, as testified to by Munive, was evidence of intercourse:

"And then on cross-examination, [Munive] was asked about his conversation with Dr. Kahn, the first doctor in the emergency department that Jane Doe saw. He and Officer Munive told you that Dr. Kahn believed there was damage to the hymen, that corroborates the charge of sexual intercourse. A tongue could not damage the hymen, okay. He believed that there was sexual penetration and Officer Munive told you that."

Additionally, despite the prosecution's characterization of his testimony here, Munive testified that he did not know if Khan was an emergency room doctor or whether he had seen Jane.

Pascacio argues the trial court had a sua sponte duty to instruct the jury that Munive's testimony about Khan's medical opinions could only be used as evidence of Munive's state of mind. Because Munive testified that Khan made a statement out of court to prove the truth of the matter asserted—i.e. that there had been "penetration into the vaginal cavity"—Pascacio contends that statement is hearsay and inadmissible unless there is an applicable exception or valid nonhearsay purpose. (See Evid. Code, § 1200, subd.(a).) According to Pascacio, the only basis for admitting the statement related to

Munive's state of mind. Failure by the court to provide a limiting instruction for this testimony, he argues, amounts to an "occasional extraordinary case in which the evidence is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Murtishaw* (2011) 51 Cal.4th 574, 590 (*Murtishaw*), quoting *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052, internal quotation marks omitted; see also Evid. Code, § 355 [general rule that a limiting instruction need only be given upon request].)

Because the issue of whether an instruction is required is a mixed question of fact and law, we review it de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1217.) Under the *Watson* reasonable probability standard for issues of instructional error, reversal is required if "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The legitimate nonhearsay purpose for Khan's statement is to show Munive's state of mind and explain his subsequent behavior, which may be minimally relevant. (1 Witkin, Cal. Evidence (5th ed. 2012) Hearsay, § 41, p. 835.) The evidence could not be used to show penetration, which would be the "truth of the matter stated" prohibited by the hearsay rule. (Evid. Code, § 1200.) A limiting instruction would have focused the jury on the narrow purpose for which the evidence could be properly considered and highlighted the inappropriate inference suggested by the prosecutor's argument.

Nevertheless, because of the vastly greater import of Pascacio's own statement, the brief reference to Khan's statement is not a "dominant part of the evidence of the

accused." (*Murtishaw, supra*, 51 Cal.4th at p. 590, internal quotation marks omitted.) Nor is it even the dominant part of the medical evidence. The jury also heard lengthy, specific, and detailed testimony from the highly-trained forensic nurse who examined Jane in the hospital, which was inconclusive as to penetration but consistent with the acts described in Pascacio's statement. Similarly, in light of Pascacio's statement and Del Degan's specific testimony regarding the victim's examination, Munive's general and relatively brief testimony regarding Khan's opinion is not "highly prejudicial."

Even if there were no sua sponte duty, Pascacio argues his trial counsel was ineffective for failing to request a limiting instruction and for failing to object to the prosecution's characterization of Munive's testimony and use of facts not in evidence in its closing argument. To obtain a reversal for ineffective assistance of counsel, the defendant must show counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and a reasonable probability of a more favorable result absent the error. (*People v. Bell* (1989) 49 Cal.3d 502, 546; *People v. Cotton* (1991) 230 Cal.App.3d 1072, 1080–1086.) Here, counsel may have had tactical reasons for deciding not to request a limiting instruction or object to the closing. But even assuming the objection should have been made and/or the instruction requested, there is no reasonable probability of a different result. (*Cotton*, at p. 1080.)

Pascacio's statement, which the record shows to be the most compelling evidence against him, admits to a series of acts from which penetration can be reasonably inferred. His attempts to explain the statement—that he was exhausted from work, that he was not able to understand Officer Munive's Spanish, and/or that he entirely fabricated the

statement to avoid assault—were not credible. The prosecution focused on Pascacio's statement, showed it to the jury in its entirety, asked him about it on the stand, and made it the focal point of their closing argument. And as discussed, Munive's testimony and the prosecution's argument on this point were brief, and the jury was unlikely to rely on Khan's statement in light of Del Degan's specific, contrary testimony. As a result, Pascacio has failed to show a reasonable probability that a limiting instruction or an objection to the prosecution's closing argument would have resulted in a more favorable ruling. Likewise, he has failed to show cumulative error. (See *People v. Hill* (2018) 17 Cal.4th 800, 844–845.)

#### DISPOSITION

The judgment is affirmed.

DATO, J.

WE CONCUR:

HUFFMAN, Acting P. J.

GUERRERO, J.